No. 06-824

IN THE

Supreme Court of the United States

J. VIRGIL WAGGONER and J.V.W. INV. LTD.,

Petitioners,

v.

SUISSE SECURITY BANK AND TRUST LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JONATHAN W. WOLFE
SKOLOFF & WOLFE, P.C.
293 Eisenhower Parkway
Livingston, NJ 07039
(973) 992-0900

ANDREW E. TOMBACK
Counsel of Record
CHARLES WESTLAND
MILBANK, TWEED, HADLEY & MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

Attorneys for Respondent

206020

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly held that plaintiff's claim for declaratory relief to resolve a controversy regarding ownership of a worthless certificate of deposit should be dismissed for lack of subject matter jurisdiction on the ground that the amount in controversy for purposes of 28 U.S.C. § 1332 did not exceed $75,000.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent states that Respondent is a corporation. Respondent does not have any parent corporations. There is no publicly-held company that owns 10% or more of its stock.

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Correspondent Servs. Corp. v. First Equities Corp.,
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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit relevant to this matter are reported at 442 F.3d 767 (reprinted in the Appendix to the Petition ("App.") at 30a) and 338 F.3d 119 (reprinted at App. 11a). The opinion and order of the United States District Court for the Southern District of New York, which was not published in the Federal Supplement, is reprinted at App. 46a.

STATUTES INVOLVED

This case involves 28 U.S.C. § 1332 (the "Diversity Statute") (reprinted at App. 3a) and 28 U.S.C. § 2201 (the "Declaratory Judgment Act") (reprinted at App. 7a).

STATEMENT OF THE CASE

In an effort to manufacture a basis for review by this Court, Petitioners J. Virgil Waggoner and J.V.W. Investment Ltd. ("Petitioners" or "Waggoner Parties") contend that this matter presents the Court with an opportunity to resolve a fundamental question of Federal jurisdiction for which there exists a conflict amongst the Circuits. It does not.

A divide does exist amongst the Circuits as to whether, for example, in suits for injunctive relief, the amount in controversy must be determined exclusively from the perspective of the plaintiff – the so called "plaintiff's viewpoint test" – or whether courts may take into account the cost to a defendant of complying with the injunctive relief sought by the plaintiff – the so called "either party test." The Waggoner Parties erroneously claim that "[t]his case presents the Court with an opportunity to resolve this split among the circuits." Petition at 7.

However, this case does not involve a claim for injunctive relief, nor does it raise any issue regarding the cost of complying with such relief. The Plaintiff in this case brought claims under the interpleader statute and the Declaratory Judgment Act alleging a dispute over the ownership of a certificate of deposit in its possession. The Defendants who made conflicting claims of ownership cross-claimed against each other regarding an investment scheme that went awry. The Petitioners seek to measure the amount in controversy in this matter not from Defendants' viewpoint vis-à-vis the complaint filed by the Plaintiff, but from Defendants' viewpoint vis-à-vis cross-claims and third-party claims subsequently lodged by and amongst non-diverse Defendants. The Court below properly rejected Defendants' misguided notion that federal jurisdiction may be exercised over a complaint that fails to meet the diversity statute's amount in controversy requirement by looking beyond the Complaint to the value of state-law cross-claims for which there exists no independent basis for jurisdiction – an approach that, on its face, runs counter to the most basic tenets of federal jurisprudence.

This matter therefore presents no issue of law over which the Circuits are divided, and the Waggoner Parties provide no basis for granting their Petition. To the contrary, both the district court and the Second Circuit correctly followed this Court's holding in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), and ruled that federal jurisdiction may not be exercised over a declaratory judgment claim brought to resolve a dispute over ownership of a worthless certificate of deposit.

FACTUAL BACKGROUND

In 1998, J. Virgil Waggoner ("Waggoner"), a wealthy Texas businessman, and Donal Kelleher ("Kelleher"), a United Kingdom citizen with an office in London, hatched an investment scheme. Pursuant to a Joint Participation Agreement (the "Joint Agreement"), Kelleher and his company, Abbeyfield Asset Management, SA, were appointed as trustee for Waggoner and were obliged to invest $10 million of Waggoner's funds in a "high-yield" investment program. *See Correspondent Servs. Corp. v. First Equities Corp.*, 338 F.3d 119, 121-22 (2d Cir. 2003) (App. at 11a). The Joint Agreement provided that Waggoner was entitled to a profit return of over 500% to be achieved and earned within the ensuing 3-5 months and that Kelleher was to receive a share of these tremendous profits ranging from 20% to 25%. *See id.* (App. at 14a). As the district court emphasized, the terms of the investment "sound so preposterous that it is difficult to fathom how any investor could possibly expect they could be fulfilled . . . ." *Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, No. 99 Civ. 8934 (RWS), 2000 WL 1174980, at *2 n.1 (S.D.N.Y. Aug. 18, 2000).

After execution of the Joint Agreement, Kelleher located a purported investment program managed by British Trade and Commerce Bank ("BTCB"), a bank organized under the laws of Dominica that has been the subject of a money-laundering investigation by Congress. *See* n.1 *infra*. Waggoner and Kelleher established JVW, with Waggoner as the sole shareholder and Kelleher as the director. *See Correspondent Servs.*, 338 F.3d at 122 (App. at 14a). Kelleher (on behalf of JVW) entered into an agreement with BTCB to invest Waggoner's $10 million. *Id.* (App. at 15a).

BTCB ultimately issued a certificate of deposit (the "CD") to JVW, and the CD was transferred to a BTCB subsidiary, First Equity Corp. (collectively with BTCB, "BTCB/First Equity"), which in turn "placed the . . . CD into the custody of CSC . . . ." *Id.*

CSC was a "clearing broker" in New York affiliated with Paine Webber that "provide[d] so-called back office and administrative services, including bookkeeping and custodial services for accounts on its books ... 'introduced' to CSC by other brokerage firms." Amended Complaint at 2 ("Complaint"). CSC held the CD in a "custodial capacity" pursuant to a clearing agreement with BTCB/First Equity. Significantly, as the Second Circuit emphasized, CSC "possessed only the physical CD document, and ***it never controlled any of the funds received by BTCB/First Equity.***" *Correspondent Servs.*, 338 F.3d at 122 (emphasis added) (App. at 15a).

Waggoner and Kelleher subsequently had a disagreement, which in turn led to the termination of the Joint Agreement. *See id.* Shortly thereafter, Kelleher and Waggoner lodged conflicting claims to the CD.

On June 25, 1999, the CD expired and reverted to a savings account at BTCB. *Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, No. 99 Civ. 8934 (RWS), 2004 WL 2181087, at *2 (S.D.N.Y. Sept. 29, 2004) (App. at 49a-50a), *aff'd sub nom. Correspondent Servs. Corp. v. First Equities Corp.*, 442 F.3d 767 (2d Cir. 2006). Contemporaneously with the expiration of the CD, Waggoner, through JVW, liquidated its bank account at BTCB and transferred the funds contained therein to another account, in the name of the Wagonwheel

Trust, another off-shore entity controlled by Waggoner.[1] *See Correspondent Servs. Corp.*, 2004 WL 2181087, at *2. The brokerage statements thereafter reflected a value of $0 for the CD. *See id.* This fact is not, and cannot be, disputed.

Meanwhile, the clearing relationship between First Equity and CSC was terminated as of July 16, 1999. Complaint at 6. Accordingly, "CSC communicated ... its intention, under the circumstances – *i.e.*, that it then possessed the CD without an introducing broker on its books – to deliver the CD [back] to [First Equity] ...." Complaint at 7. In response, Kelleher reiterated his claim to ownership and objected to CSC's proposed transfer of the CD to First Equity.

PROCEDURAL HISTORY

I. CSC'S COMPLAINT

With no legal basis to continue as custodian of the CD, CSC brought this action, seeking court intervention to resolve the competing claims to the CD. As CSC alleged in its Complaint:

> In sum, notwithstanding the position by [First Equity] that the CD had matured and had no further value, CSC was confronted with repeated claims by Kelleher that the CD had a value of $10,600,000, that CSC was obligated to retain

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[1] The district court noted that "the [United States] Senate Investigations Report has at least raised questions as to . . . the movement of Waggoner's money." *Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, 173 F. Supp. 2d 171, 179 (S.D.N.Y. 2001).

> either the CD or the cash equivalent in the amount of $10,600,000, and that CSC risked being subject to a claim by Kelleher in that amount ***if it transferred the CD*** to anyone other than him or those designated by him.

Complaint at 8 (emphasis added). On the basis of the foregoing, CSC alleged interpleader claims premised on the allegation that "[i]f CSC delivers the CD to Kelleher or [First Equity], it could be subject to multiple claims and potential liability." Complaint at 9, 10. CSC interposed a companion declaratory judgment claim based on the allegation that "[t]here is an actual controversy pending as to ***the ownership of the CD***." Complaint at 10 (emphasis added). Both the interpleader claims and the declaratory judgment claim sought the same relief – discharge from liability upon CSC's deposit of the CD with the Court.[2]

None of the Defendants to CSC's Complaint filed counterclaims against CSC, other than Kelleher who, mirroring CSC's Complaint, simply sought a declaration that the CD should be returned to him. *See* Answer and Counterclaims of Donal Kelleher dated March 1, 2000. Kelleher and the Waggoner Parties filed various state law cross-claims against each other after their investment scheme went awry with respect to the proceeds that once had backed the CD. *See Correspondent Servs. Corp.*, 2004 WL 2181087, at *2. SSBT, a Bahamian bank that at one time held certain

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[2] *See* Complaint at 9-11: "WHEREFORE, CSC requests an Order and Judgment of this Court . . . permitting and directing to CSC to deposit the subject CD with the Clerk of the Court; enjoining defendants from taking any action as against CSC; discharging CSC with prejudice; and reimbursing CSC for its costs and attorneys' fees."

of the proceeds backing the CD, was subsequently joined as a third-party defendant by the Waggoner Parties, who attached $3 million of SSBT's assets. *See id.* SSBT is represented in this action by Raymond Winder, the liquidator of SSBT (the "*Liquidator*") appointed by a Bahamian court.

During discovery, the Liquidator unearthed the fact – known and undisclosed all along by the Waggoner Parties – that over a month prior to the commencement of this action, the CD had expired and had been rendered worthless by Waggoner's own actions (his transfer to himself of the funds on deposit at BTCB). *See id.* Because the CD had no value and did not satisfy the requisite monetary thresholds for interpleader or diversity jurisdiction, the Liquidator moved to dismiss the action for lack of subject matter jurisdiction. *See id.*, at *3. Faced with dismissal, the Waggoner Parties brought a new action against SSBT in state court that is still pending. *See id.* Knowing that their own actions had rendered the CD worthless well before CSC filed its first Complaint, the Waggoner Parties nevertheless opposed SSBT's motion to dismiss.

II. THE COURTS BELOW DETERMINED THAT THE CD IS WORTHLESS AND HENCE CANNOT SUPPORT INTERPLEADER JURISDICTION AND THAT NO INDEPENDENT BASIS FOR JURISDICTION EXISTS OVER EITHER THE CROSS-CLAIMS OR THIRD PARTY CLAIMS.

On May 30, 2002, the district court granted the Liquidator's motion to dismiss for lack of subject matter jurisdiction, holding that that CD – the subject matter of CSC's Complaint – was worthless as of June 25, 1999 (and, hence, before CSC filed its Complaint), and vacated

the attachment of SSBT's assets. *Correspondent Servs. Corp. v. J.V.W. Inv. Ltd.*, 205 F. Supp. 2d 191, 198 (S.D.N.Y. 2002), *vacated sub nom. Correspondent Servs. Corp. v. First Equities Corp.*, 338 F.3d 119 (2d Cir. 2003).

On July 16, 2003, the Second Circuit ruled on an appeal taken by the Waggoner Parties from the district court's dismissal of the action. *Correspondent Servs. Corp.*, 338 F.3d at 119 (App. at 11a). Noting that "it is undisputed that CSC possessed only the physical CD, which had *no value* when CSC brought suit," the Second Circuit affirmed the district court's conclusion that "statutory interpleader [28 U.S.C. § 1335] did not provide a basis for jurisdiction over this action." *Id.* at 124 (emphasis added) (App. at 19a-20a). The court likewise held that because "CSC ***owned nothing of value*** to be interpleaded," *id.* (App. at 19a), the action could not meet the $75,000 amount-in-controversy requirement for diversity jurisdiction pursuant to 28 U.S.C. § 1332. *Id.* (emphasis added). The court also concluded that the amount in controversy in this action could not meet the $75,000 requirement for diversity jurisdiction. *Id.* (App. at 19a-20a).

The Second Circuit also rejected a plethora of baseless contentions concocted by the Waggoner Parties in an effort to manufacture a basis for federal jurisdiction over the cross-claims and third-party claims filed by and amongst the Defendants, including the Waggoner Parties' claims against third-party defendant SSBT. *Id.* at 124-25 (App. at 20a-21a). Among other things, the Waggoner Parties asked the Court to "deem" Plaintiff CSC's complaint irrelevant for jurisdictional purposes and to "deem" party-defendant JVW (an alien) to be a non-party "intervenor" to the litigation – thus trying to manufacture "diversity" between the remaining parties. *Id.* at 124 (App. at 20a). The Second Circuit rejected

the Waggoner Parties' "novel" argument, held that there was no independent basis for jurisdiction over any of the state law cross-claims, and emphasized that the Waggoner Parties had "provide[d] . . . no caselaw to support their contention." *Id.* at 124 (App. at 20a).

Although upholding the district court's decision that CSC's interpleader claims failed to satisfy the amount-in-controversy requirement in 28 U.S.C. § 1332, the Second Circuit noted that the district court "did not ***explicitly*** determine" whether CSC's Declaratory Judgment Claim pursuant to 28 U.S.C. § 2201 (the "DJ Claim") "supports diversity jurisdiction." *Id.* at 125 (emphasis added) (App. at 22a). Accordingly, the court remanded for an explicit determination by the district court on that issue.

III. THE COURTS BELOW CONCLUDED THAT THE OBJECT OF CSC'S CLAIM IS A WORTHLESS CD AND THEREFORE CANNOT SATISFY THE JURISDICTIONAL MINIMUM OF THE DIVERSITY STATUTE

On remand, SSBT renewed its motion to dismiss CSC's DJ claim in the district court on the ground that because the "object" of CSC's DJ Claim was the valueless CD, the claim necessarily must be dismissed. Aware that CSC's unequivocal definition of the actual controversy for which it sought declaratory relief was fatal to their position, the Waggoner Parties advanced the bizarre contention that they should be allowed to amend CSC's Complaint to change the "object" of its claim.

Rebuffing the Waggoner Parties, the district court concluded that because the "object" of CSC's DJ Claim was

the "valueless" CD, "[i]t necessarily follows that the amount-in-controversy requirement . . . has not been satisfied and th[e] Court lacks subject matter jurisdiction." *Correspondent Servs. Corp.*, 2004 WL 2181087, at *12 (App. at 46a). The district court denied the Waggoner Parties' request for leave to amend CSC's complaint in the absence of any precedent allowing a defendant to amend a plaintiff's pleading, *Correspondent Servs. Corp.*, 2004 WL 2181087, at *12 (App. at 71a), and once again voiced concern about the Waggoner Parties' bad faith and wrongful invocation of Federal jurisdiction. *Id.* at *16 (App. at 79a) (holding the "attachment of SSBT's assets – obtained under circumstances that suggest that Waggoner had reason to know that subject matter jurisdiction was lacking when it was, in fact, lacking – ***was wrongful***, and as a result of the attachment SSBT has sustained a substantial financial burden . . . .") (emphasis added).

On March 10, 2006, the Court of Appeals for the Second Circuit affirmed the district court's decision. *See Correspondent Servs. Corp. v. First Equities Corp.*, 442 F.3d 767 (2d Cir. 2006) (App. at 30a). Relying upon this Court's decision in *Hunt,* the Second Circuit held that "'[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.'" *Id.* at 769 (App. at 35a) (quoting *Hunt*, 432 U.S. at 347). The court observed that "[b]ased on its review of the relevant allegations in the complaint, the district court concluded that the object of the litigation in this case was the worthless CD and therefore determined that the . . . jurisdictional amount had not been satisfied." *Correspondent Servs. Corp.*, 442 F.3d at 769. The court

further cited with approval the following holding of the district court:

> Because the CD has been identified by the plaintiff in this action as the object of the 'actual controversy,' its value provides the appropriate basis for the measure of the amount in controversy .... It follows that, since the CD 'had no value when CSC brought suit,' the amount in controversy ... falls short ...."

Id. at 769 (App. at 35a -36a).

Accordingly, the court affirmed the district court's holding that diversity jurisdiction was lacking over CSC's DJ Claim. *Id.*

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLIT IDENTIFIED BY PETITIONERS IS IRRELEVANT TO THIS MATTER

In a last ditch effort to continue their federal attachment of SSBT's assets that was void *ab initio* and to avoid litigating state law claims against SSBT in an already pending New York state court action, the Waggoner Parties seek review of the Second Circuit's decision under the guise of a purported conflict amongst the Circuits. *See* Petition at 7.

The cases and commentary cited by the Waggoner Parties involve cases where "the benefit of the action to the plaintiff will have a different value than the burden imposed on the defendant should relief be granted." 14B Charles Alan Wright

et al., Federal Practice and Procedure § 3703 (3d ed. 1998). The principal example is the case where a "plaintiff is seeking an injunction directing the defendant to tear down, as a nuisance, a $10 million building that the defendant owns." *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002). In such cases, some Circuits have held that the jurisdictional minimum can be met by the cost of the defendant's compliance with the relief sought by the plaintiff. *See, e,g., Comm. for GI Rights v. Callaway*, 518 F.2d 466, 472 (D.C. Cir. 1975) (holding that the jurisdictional minimum could be measured by the defendant's "cost of enforcing" plaintiff's requested injunctive relief); *see also In re Ford Motor Co./Citbank (S.D.), N.A.*, 264 F.3d 952, 958 (9th Cir. 2001) (discussing injunction cases where the value of a plaintiff's claim is below the jurisdictional threshold, but the "potential cost to the defendant of complying ... exceeds [the jurisdictional amount.]").

Other Circuits have rejected this rule. *See, e.g., Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 539 (3d Cir. 1995) (holding that the amount in controversy is determined by the "the value of the rights which the plaintiff seeks to protect" and not the "cost of compliance" to defendant); *see also Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 640 (5th Cir. 2003) (amount in controversy focuses "solely on the plaintiff's viewpoint ...."); *Mass. State Pharm. Ass'n v. Fed. Prescription Serv.*, 431 F.2d 130, 131 n.1 (8th Cir. 1970) (holding that in suit for injunctive relief, the "plaintiff's viewpoint" is the only valid rule) (cited by *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 48 (2d Cir. 1972) (suit under 28 U.S.C. § 1331 to declare state legislation unconstitutional)).

In measuring the amount in controversy, the Circuits thus are divided where, as noted above, "the benefit of the action to the plaintiff will have a different value than the burden imposed on the defendant should relief be granted." 14B Charles Alan Wright *et al.*, Federal Practice and Procedure § 3703 (3d ed. 1998); *see also* 15 James Wm. Moore, *et al.*, Moore's Federal Practice § 102.109 (3d ed. 2004) (identifying split amongst the Circuits in "action[s] seeking injunctive relief, [where] a plaintiff may not stand to benefit by an amount in excess of the jurisdictional amount; however, the cost of compliance to the defendant might well be in excess of the jurisdictional amount."). This case presents no such jurisdictional quandary. To the contrary, this matter was commenced by CSC to resolve competing ownership claims to a CD in its possession. CSC "possessed only the physical CD document, and *it never controlled any of the funds*" backing the CD, which were held by an unrelated bank (*BTCB/First Equity*). *Correspondent Servs. Corp.*, 338 F.3d at 122 (emphasis added) (App. at 15a).

CSC's claim for declaratory relief sought a declaration to resolve an "actual controversy pending as to ***the ownership of the CD***," Complaint at 10, which (as stated) indisputably was worthless at the time CSC commenced this action. Thus, the declaration sought by CSC, unlike the cases in which the identified Circuit split has arisen, has no conceivable "pecuniary burden" on any of the Defendants. Put simply, the CD at issue is worthless regardless from whose perspective its value is measured, and the relief sought by Plaintiff CSC would have imposed no cost on any Defendants. *See, e.g., Ericcson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc.*, 120 F.3d 216, 220 n.13 (11th Cir. 1997) (recognizing that "in many cases, the perspective used to determine the amount in controversy [is]

immaterial . . . because the value of the object of the litigation [is] the same whether measured from the plaintiff's or the defendant's perspective."); *see also Cent. Mex. Light & Power v. Munch*, 116 F.2d 85, 87-88 (2d Cir. 1940) (applying plaintiff's viewpoint rule, but noting that even from defendants' viewpoint, case failed to satisfy the amount in controversy threshold).

Aware of this fundamental defect in their position, the Petitioners misleadingly contend that the "either party" test somehow would allow the amount in controversy to be determined "from a review of the entire controversy" – *i.e.*, presumably including the value of the state law cross-claims and third-party claims filed by and amongst the Defendants. *See* Petition at 7. As the Second Circuit correctly held, however, there is no independent basis for jurisdiction over the Defendants' state law cross-claims and third-party claims. *See Correspondent Servs. Corp.*, 338 F.3d at 124 (App. at 20a). The Waggoner Parties do not dispute this ruling in their Petition. Furthermore, the Waggoner Parties' assertion (Petition at 13) that Kelleher "demanded and sought to recover $10.6 million from CSC" misstates the record. Indeed, Kelleher's counterclaim against CSC sought no monetary damages, asserting only an ownership interest in the CD. *See* Answer and Counterclaims of Donal Kelleher dated March 1, 2000.

Contrary to the Waggoner Parties' assertion, even in the Circuits that follow the "either party" test, the courts make clear that the amount-in-controversy requirement remains focused upon the "object sought to be accomplished by the plaintiffs' complaint." *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940); *see also Dixon v. Edwards*, 290 F.3d 699, 710-711 (4th Cir. 2002) (under the "either

party" test, plaintiff's complaint must be examined to determine the pecuniary result to either party that a judgment would produce.).

II. THE COURTS BELOW PROPERLY FOLLOWED THIS COURT'S HOLDING IN *HUNT v. WASHINGTON STATE APPLE ADVERTISING COMMISSION*

The courts below followed this Court's clear directive and measured the amount in controversy for CSC's DJ Claim "by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. Having previously issued six decisions in the matter, the district court, based upon the record and its familiarity with the action, construed the Complaint as follows:

> While ... the amended complaint reflects a concern with potential liability, the allegations contained in [the DJ Claim] amply demonstrate that this attention to liability is derived from the "controversy pending as to the ownership of the CD," the possibility of a claim from Kelleher arising "in the event [CSC] transferred the CD," and the potential for any other claims "in connection with the CD or [CSC's] role as custodian of the CD."

Correspondent Servs. Corp., 2004 WL 2181087, at *9 (App. at 64a).

The district court concluded that "[u]nder these circumstances, to conclude that the object of the litigation ... is something other than the CD would run contrary to the most reasonable reading of the [Complaint]." *Id.* The

district court noted that its decision was consonant with the manner in which the amount in controversy is measured in actions where a declaration is sought concerning the ownership of (i) real property, (ii) personal property, and (iii) commercial paper or securities. *Id.* at *8 (citing relevant precedent) (App. at 62a).

The Court of Appeals, similarly relying on *Hunt*, affirmed the dismissal of the action, observing that "[b]ased on its review of the relevant allegations in the complaint, the district court concluded that the object of the litigation in this case was ***the worthless CD*** and therefore determined that the . . . jurisdictional amount had not been satisfied." *Correspondent Servs. Corp.*, 442 F.3d at 769 (App. at 35a) (emphasis added).

This dispute to resolve competing claims to ownership of a worthless CD has needlessly squandered more than seven (7) years of federal judicial resources. There is no conceivable basis to measure the amount in controversy by the value of state law cross-claims lodged amongst non-diverse defendants, and no precedent from any circuit to support the exercise of jurisdiction over a claim for declaratory relief to resolve competing claims to a worthless object.

The Courts below properly applied well-settled precedent from this Court and dismissed this action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW E. TOMBACK
Counsel of Record
CHARLES WESTLAND
MILBANK, TWEED, HADLEY
& MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

JONATHAN W. WOLFE
SKOLOFF & WOLFE, P.C.
293 Eisenhower Parkway
Livingston, NJ 07039
(973) 992-0900